No. 10-941

IN THE

Supreme Court of the United States

DERRICK O'NEAL MASON,

Petitioner,

—v.—

KIM T. THOMAS, Interim Commissioner,
Alabama Department of Corrections,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR REHEARING

ONA T. WANG
Counsel of Record
S. JEANINE CONLEY
BRIAN K. ESSER
BAKER & HOSTETLER LLP
45 Rockefeller Plaza
New York, New York 10111
(212) 589-4200
owang@bakerlaw.com

Attorneys for Petitioner

TABLE OF CONTENTS

	PAGE
CAPITAL CASE	1
PETITION FOR REHEARING	1
ARGUMENT	2
I. REHEARING SHOULD BE GRANTED TO PERMIT FURTHER CONSIDERATION FOLLOWING THIS COURT'S GRANT OF CERTIORARI IN *MAPLES*	2
A. As in *Maples*, Mr. Mason Demonstrated Sufficient Cause to Excuse Any Procedural Default	2
B. Petitioner Suffered Significant Prejudice Resulting From His Constitutional Claims Not Being Reviewed by the State Post-Conviction and Federal Habeas Courts	8
II. EQUITABLE PRINCIPLES REQUIRE REHEARING	11
CONCLUSION	13

TABLE OF AUTHORITIES

Cases: PAGE

Anderson v. Bessemer City,
470 U.S. 564 (1985) 8

Batson v. Kentucky,
476 U.S. 79 (1986) 10

Dugger v. Adams,
489 U.S. 401 (1989) 12

Ex Parte Mason,
768 So. 2d 1008 (Ala. 2000) 4

Ex parte Scott,
No. 1091275, 2011 WL 925761
(Ala. Mar. 18, 2011)..... 9

Holland v. Florida,
130 S. Ct. 2549 (2010) 7, 12

House v. Bell,
547 U.S. 518 (2006) 3

Kennedy v. Louisiana,
554 U.S. 407 (2008) 11, 12

Maples v. Allen,
586 F.3d 879 (11th Cir. 2009)..... 3, 10

Maples v. Thomas,
131 S. Ct. 1718 (2011) ..... *passim*

Mason v. Alabama,
531 U.S. 994 (2000) 4

PAGE

Mason v. State,
768 So. 2d 981
(Ala. Crim. App. 1998)..... 4

Miranda v. Arizona,
384 U.S. 436 (1966)..... 10

Munaf v. Geren,
128 S. Ct. 2207 (2008)..... 12

Murray v. Carrier,
477 U.S. 478 (1986)..... 8

Pierce v. State,
851 So. 2d 558 (Ala. Crim. App. 1999),
rev'd on other grounds, Ex parte Pierce,
851 So. 2d 606 (Ala. 2000).....5, 6, 7

Wainright v. Sykes,
433 U.S. 72 (1977)..... 3

Weeks v. State,
568 So. 2d 864
(Ala. Crim. App. 1989)..... 8

State Statutes:

Ala. Code § 13A-5-40(a)(2) (1975)..... 4

Rules:

Ala. R. App. P. 4(b)(1).....3, 6, 7, 8

Ala. R. Crim. P. 32.1 .....*passim*

Supreme Court Rule 44.2..... 1

CAPITAL CASE

PETITION FOR REHEARING

Petitioner, Derrick O'Neal Mason, respectfully moves this Court for an Order vacating the denial of his Petition for Writ of Certiorari (the "Certiorari Petition"), entered on April 25, 2011 and granting the Certiorari Petition or, alternatively, holding the Certiorari Petition in abeyance pending this Court's disposition of *Maples v. Thomas*, 131 S. Ct. 1718 (2011). The federal habeas courts below in both *Maples* and the instant case held that certain of petitioners' serious constitutional claims were procedurally defaulted because of purported untimely appeals of Alabama trial court post-conviction orders. This Court granted certiorari in *Maples* to decide whether the State of Alabama may execute Mr. Maples without federal habeas review of his constitutional claims due to a missed appeal deadline that was no fault of the petitioner. Accordingly, as discussed below, this Court's resolution of the question presented in *Maples* will have direct bearing on the issues presented in Mr. Mason's Certiorari Petition, and require this Court to rehear the denial of certiorari in Mr. Mason's case.[1]

[1] According to Supreme Court Rule 44.2: "Any petition for the rehearing of an order denying a petition for a writ of certiorari or extraordinary writ shall . . . be limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented." The below detailed analysis comparing *Maples* with Mr. Mason's case is presented to the Court for the first time in this Petition for Rehearing.

ARGUMENT

I. REHEARING SHOULD BE GRANTED TO PERMIT FURTHER CONSIDERATION FOLLOWING THIS COURT'S GRANT OF CERTIORARI IN *MAPLES*

Mr. Mason's Certiorari Petition involves the same procedural default issues raised in *Maples*. Accordingly, the Certiorari Petition should be granted or held in abeyance until *Maples* is decided.

A. As in *Maples*, Mr. Mason Demonstrated Sufficient Cause to Excuse Any Procedural Default

Mr. Mason showed cause for his purported out-of-time state post-conviction appeal on grounds substantially similar to those presented in *Maples*.

After appealing his criminal conviction through Alabama's direct appeal process, on August 1, 2001, Mr. Maples, through the law firm Sullivan & Cromwell, filed a petition for post-conviction relief under Ala. R. Crim. P. 32.1, raising ineffective assistance of counsel and other claims. Brief for Petitioner at 5-6, *Maples v. Thomas*, 131 S. Ct. 1718 (2011) (No. 10-63). On May 22, 2003, the trial court issued an order denying the petition. *Id.* at 6. Mr. Maples, however, did not receive timely notice of this order. *Id.* The trial court mailed copies of the order to Mr. Maples' counsel at Sullivan & Cromwell, but both attorneys representing Mr. Maples had left the firm and the order was returned to the trial court clerk unopened.

On August 13, 2003, about one month after the 42-day deadline to file a notice of appeal under Ala. R. App. P. 4(b)(1) had passed, the State's attorney sent a letter to Mr. Maples informing him of the denied Rule 32 petition. *Id.* at 7. Mr. Maples then immediately informed his family, who contacted Sullivan & Cromwell. *Id.* The firm sought leave to appeal notwithstanding the missed deadline, but the request was denied. *Id.*

On federal habeas review, the Northern District of Alabama and the Eleventh Circuit decided, among other things, that Mr. Maples' ineffective assistance of counsel claims were procedurally defaulted because Mr. Maples did not timely appeal the dismissal of his Rule 32 petition. *Maples v. Allen*, 586 F.3d 879, 885-92 (11th Cir. 2009). Mr. Maples then petitioned this Court for certiorari arguing, among other things, that Mr. Maples established cause for not following the state procedural rule setting the time to file an appeal and suffered prejudice as a result of his constitutional claims not being reviewed by the federal habeas courts. *Wainright v. Sykes*, 433 U.S. 72, 87 (1977) (holding that federal courts may excuse a default where the prisoner had "cause" for not following the state procedural rule and suffered prejudice); *see also House v. Bell*, 547 U.S. 518, 536 (2006).

On March 21, 2011, this Court granted certiorari in *Maples* on the following question:

> Whether the Eleventh Circuit properly held—in conflict with the decisions of this Court and other Courts—that there was no cause to excuse any procedural default where petitioner was blameless for the

> default, the State's own conduct contributed to the default, and petitioner's attorneys of record were no longer functioning as his agents at the time of any default.

Mr. Mason's appeal of the state trial court's dismissal of his Rule 32 petition involves similar issues. On June 16, 1995, Mr. Mason was convicted of the capital offense defined in Ala. Code § 13A-5-40(a)(2) (1975) in Madison County Circuit Court. R.E.418. On August 14, 1995, the trial court accepted the jury's 10-2 death sentence recommendation and sentenced Mr. Mason to death. R.E.419.

On March 6, 1998 and April 7, 2000, the Alabama Court of Criminal Appeals and the Alabama Supreme Court, respectively, affirmed Mr. Mason's conviction and death sentence. *Mason v. State*, 768 So. 2d 981 (Ala. Crim. App. 1998); *Ex Parte Mason*, 768 So. 2d 1008 (Ala. 2000). On November 13, 2000, this Court denied Mr. Mason's petition for a writ of certiorari. *Mason v. Alabama*, 531 U.S. 994 (2000).

On October 17, 2001, Mr. Mason filed a Rule 32 petition in Madison County Circuit Court. The trial court declined to conduct an evidentiary hearing and on August 5, 2004, denied Mr. Mason's Rule 32 petition by adopting the State's 63-page proposed order in its entirety. Due to the trial court's clerical error, however, neither Mr. Mason nor the State were notified of the disposition of Mr. Mason's petition until April 26, 2005, well after the time for Mr. Mason to appeal under Alabama law had expired. On May 27, 2005, Mr.

Mason filed a petition for writ of mandamus to the Honorable Bruce E. Williams, Circuit Judge for the Twenty-Third Judicial Circuit. Neither the trial court nor the State opposed the petition. On June 29, 2005, the Alabama Court of Criminal Appeals granted Mr. Mason's petition and ordered that the August 5th Order dismissing Mr. Mason's Rule 32 petition be vacated and a new order issued.

On July 7, 2005, the trial court once again entered the State's proposed order with the addition of an introductory section explaining the procedural posture described above. On July 14, 2005, Mr. Mason filed an Objection to the Court's Adoption of the State's Proposed Order Denying his Rule 32 Petition. The court overruled the Objection and denied the Rule 32 petition on July 29, 2005. Just 24 days later, on August 22, 2005, Mr. Mason filed a Notice of Appeal of the denial of his Rule 32 petition. As in *Maples*, the Alabama Court of Criminal Appeals dismissed Mr. Mason's Rule 32 appeal as untimely filed. App.112a. On August 18, 2006, the Supreme Court of Alabama denied certiorari with no analysis. App.113a.

Like Mr. Maples, Mr. Mason has demonstrated cause sufficient to excuse the purported out-of-time appeal. Mr. Mason is wholly blameless for the purported untimely appeal, which occurred due to the unconstitutionally flawed and inconsistent Alabama case law and rules concerning appealing an adverse Rule 32 order. In Alabama, a petitioner is required to object to a final order of dismissal at the trial level in order to preserve his claim that the dismissal was improper. *Pierce v. State*, 851 So. 2d 558, 574 (Ala. Crim. App. 1999),

rev'd on other grounds, *Ex parte Pierce*, 851 So. 2d 606 (Ala. 2000). Thus, a petitioner's claim of an erroneous dismissal is not ripe until his objection is overruled. Because a trial court is not required to rule on an objection within any specified period of time, under the Alabama Court of Criminal Appeals' calculation, a petitioner's time to appeal could run out before he ever received a ruling on a timely-filed objection, *i.e.* before his claim became ripe. Thus, the 42-day period under Ala. R. App. P. 4(b)(1) can only be logically counted from the time the appealable issue becomes ripe, upon the judge's overruling of the petitioner's objection. Of course, the issue will never ripen if the judge sustains the objection. The Alabama Court of Criminal Appeals erroneously dismissed Petitioner's appeal as untimely because it counted the 42-day time to appeal from a date when Petitioner's appeal was not yet ripe, namely, the date of the initial order rather than the date of the judge's final ruling on Mr. Mason's *Pierce* Objection.

In order for petitioners to have the full 42 days to appeal afforded by Ala. R. App. P. 4(b)(1), the time under those rules should be counted from the date the appeal becomes ripe, which is the date that the petitioner's *Pierce* Objection is overruled and denied. To calculate otherwise would put petitioners between the proverbial rock and hard place. For example, if Mr. Mason had filed his Notice of Appeal within 42 days from the time the first order was signed, and had not received a ruling on his Objection to the entry of the order, his appeal would have been dismissed under *Pierce* for failure to preserve his claims. Instead, Mr. Mason waited to file his Notice of Appeal until his claims were properly preserved and his appeal

was ripe; yet his due process rights were abrogated because the Court of Criminal Appeals ruled that his appeal was untimely, even though his appeal had been ripe for only 24 days. Had the Court of Criminal Appeals correctly tolled Mr. Mason's time to appeal under Ala. R. App. P. 4(b)(1) until the trial court decided his Objection, Mr. Mason's Notice of Appeal would have been timely filed.

The State's case law and procedural scheme concerning the time to appeal a Rule 32 petition under Ala. R. App. P. 4(b)(1) is constitutionally flawed. It shrinks the 42-day period for all petitioners because the disposition of the required *Pierce* Objection will never be made and decided on the same day the denial of the Rule 32 petition is signed. Moreover, petitioners who do not receive rulings on their required *Pierce* Objections before the expiration of the appeal period will be entirely barred from seeking review. Thus, no petitioner ever has the full 42 days afforded by Ala. R. App. P. 4(b)(1).

Accordingly, Mr. Mason demonstrated the same "cause" for filing a purported out-of-time Rule 32 appeal as demonstrated in *Maples*. Petitioner himself was not at fault for the purported out-of-time appeal; he instructed his counsel to file the Notice of Appeal and believed that they had complied with his instructions. *See Holland v. Florida*, 130 S. Ct. 2549, 2568 (2010) (if a missed deadline cannot be constructively attributed to the petitioner, remedies such as equitable tolling are available). The State is to blame due to the unconstitutional and incongruent Alabama case law and rules regarding the time to appeal under Ala. R. App. P.

4(b)(1). The State's byzantine post-conviction appellate mechanisms, akin to interference by state officials, are objective factors that impeded counsel's efforts to file an unequivocally timely appeal. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986). Identical to the issue now before this Court in *Maples*, Mr. Mason must not be held responsible for a purported missed deadline at no fault of his own.

B. Petitioner Suffered Significant Prejudice Resulting From His Constitutional Claims Not Being Reviewed by the State Post-Conviction and Federal Habeas Courts

Mr. Mason has suffered significant prejudice due to failure of the Alabama appellate courts on collateral review and the federal courts to consider his serious constitutional claims because of the purported out-of-time Rule 32 appeal, in particular because Mr. Mason has not been provided the opportunity to develop the facts of these claims during state post-conviction or federal habeas proceedings.

First and foremost, rather than conducting an independent and objective evaluation of the merits of Mr. Mason's claims, the Rule 32 trial court adopted verbatim the State's proposed order in denying Mr. Mason's Rule 32 petition. This practice has been frowned upon by the Alabama courts and this Court for years,[2] and is now improper in

[2] *See, e.g., Anderson v. Bessemer City*, 470 U.S. 564, 572-73 (1985) (noting Court's prior criticism of verbatim adoption of findings of fact prepared by prevailing party); *Weeks v. State*, 568 So. 2d 864, 865 (Ala. Crim. App. 1989)

Alabama as a matter of law. *Ex parte Scott*, No. 1091275, 2011 WL 925761 (Ala. Mar. 18, 2011) (remanding case to Rule 32 trial court because trial court adopted the State's proposed order near verbatim in denying petitioner's Rule 32 petition). The Court of Criminal Appeals in Mr. Mason's case never reached this issue because it denied Mr. Mason's Rule 32 appeal as untimely, thus costing Mr. Mason the opportunity of an independent and objective evaluation of the merits by any court of his Rule 32 claims.

To make matters worse, Mr. Mason's purportedly untimely Rule 32 appeal has been relied upon by the federal habeas courts below in refusing to consider his serious constitutional claims on their merits. Mr. Mason contends that his trial counsel failed to, among other things, adequately investigate, prepare for and present mitigating evidence during the sentencing phase of his trial, including Mr. Mason's mental health history, mother's use of drugs and alcohol during pregnancy, and involuntary intoxication at the time of the crime. The District Court refused to consider the merits of this claim because, according to the District Court, these allegations were first raised in Mr. Mason's Rule 32 petition, the denial of which was not timely appealed. App.236a-238a. The Eleventh Circuit denied Mr. Mason's request for a certificate of appealability on this claim. Had this mitigating evidence been presented to the trial court during Mr. Mason's sentencing hearing, Mr. Mason likely would not have been sentenced

("[W]e issue a caution that courts should be reluctant to adopt verbatim the findings of fact and conclusions of law prepared by the prevailing party.").

to death. The federal habeas courts in *Maples* also refused to consider the merits of similar ineffective assistance of counsel claims because of Mr. Maples' purported out-of-time Rule 32 appeal. *Maples*, 586 F.3d at 884.

Mr. Mason's prejudice is even more severe than Mr. Maples', as the federal courts below refused to hear several other of Mr. Mason's meritorious constitutional claims, deciding they were procedurally defaulted due to Mr. Mason's purported out-of-time Rule 32 appeal. Along with ineffective assistance of counsel, the District Court also refused to hear on the merits Mr. Mason's claims that: (1) the trial court erroneously instructed the jury at both the guilt and sentencing phases; (2) the trial court erred admitting into evidence highly prejudicial expert testimony; (3) Mr. Mason's custodial statements were coerced and involuntary in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966); (4) the prosecution argued certain facts not in the record during both the guilt and sentencing phases of Mr. Mason's trial; (5) the prosecution struck jurors on account of race in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986); and (6) his sentence of death is unconstitutional because it was sought and imposed pursuant to a pattern of racial bias in imposition of the death penalty. App.169a-174a, 178a-185a, 222a, 225a-226a, 231a-235a, 251a-252a. Out of these purportedly procedurally defaulted claims, the Eleventh Circuit granted Mr. Mason a certificate of appealability only on his *Miranda* claim, but agreed with the District Court's procedural default analysis. App.10a-11a.

The failure of the federal courts below to review these serious constitutional claims on their merits is prejudice enough to excuse any procedural default, but such failure is particularly prejudicial here where the Eleventh Circuit found a constitutional Confrontation Clause violation, but decided it was harmless because the other evidence was sufficient to sustain a guilty verdict and sentence of death. App.15a-17a. Merits review of the litany of serious constitutional claims presented by Mr. Mason above would result in more than a reasonable probability that the violation of Mr. Mason's Confrontation Clause rights was not harmless, entitling Mr. Mason to habeas relief.

II. EQUITABLE PRINCIPLES REQUIRE REHEARING

Mr. Mason has presented several strong and serious constitutional claims that warrant habeas relief. Those claims should have been reviewed on their merits by the federal courts below because Mr. Mason presented sufficient "cause and prejudice" to excuse the purported untimely appeal of the trial court's dismissal of his Rule 32 petition. The fact that a man may be executed in these circumstances without any federal merits review of those claims—in particular the denial of constitutionally guaranteed assistance of counsel at trial, which resulted in the bare minimum verdict necessary to impose the death sentence, and rendered such sentence wholly unreliable—may call into question the legitimacy of the system of capital punishment and "transgress the constitutional commitment to decency and restraint," *Kennedy v.*

Louisiana, 554 U.S. 407, 420 (2008), and certainly warrants this Court's review.

Moreover, decisions of this Court have emphasized that "[h]abeas corpus is 'governed by equitable principles.'" *Munaf v. Geren*, 128 S. Ct. 2207, 2200 (2008) (citation omitted); *see also Holland*, 130 S. Ct. at 2562. This Court maintains equitable discretion to correct a miscarriage of justice, including the power to over look a petitioner's state procedural default. *Dugger v. Adams*, 489 U.S. 401, 410 (1989). Denying an indigent death-row prisoner access to federal courts with respect to serious constitutional claims because of a purported missed deadline, not the fault of Mr. Mason, is fundamentally unjust and incompatible with the equitable principles on which habeas corpus is grounded, if not the Constitution itself.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Certiorari Petition, Mr. Mason respectfully requests that this Court grant rehearing of the Order denying the Certiorari Petition, vacate that Order, and grant the Certiorari Petition or, alternatively, hold Mr. Mason's case in abeyance pending a decision by this Court in *Maples*.

Respectfully submitted,

ONA T. WANG
Counsel of Record
S. JEANINE CONLEY
BRIAN K. ESSER
BAKER & HOSTETLER LLP
45 Rockefeller Plaza
New York, New York 10111
(212) 589-4200
owang@bakerlaw.com

Attorneys for Petitioner

CERTIFICATE OF COUNSEL

As counsel for Petitioner, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Supreme Court Rule 44.2.

/s/ ONA T. WANG
Ona T. Wang
Counsel of Record for Petitioner